

On file OSD release instructions apply.

THE WHITE HOUSE

WASHINGTON

On file GSA release instructions

apply. On file OSD release instructions apply.

June 27, 1973

ER&L / EDITH, 9 OCT 02

OSD REVIEW COMPLETED

MEMORANDUM FOR:



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NSC

STATINTL

FROM:

RICHARD TUFARO *RT*

SUBJECT:

DRAFT LETTER TO JUSTICE ON
CLASSIFICATION/DECLASSIFICATION
OF FOREIGN INFORMATION

NSC REVIEW
COMPLETED,
6/26/2003

Enclosed please find a draft letter to Mr. Dixon posing the four questions related to classification and declassification of foreign classified information and material which we sketched out at our meeting on June 22, 1973.

I understand from our last meeting that Mr. Spiegel and you will be responsible for finalizing this letter. When the original is sent to Mr. Dixon, copies should also be sent to all other members of the ICRC.

DRAFT
6/27/73

Dear Mr. Dixon:

As you know, the Interagency Classification Review Committee established a subcommittee to make recommendations on procedures for the classification and declassification of foreign classified information received by the United States Government. I have been advised by this subcommittee that in order to proceed further with its study in this area, several issues of legal interpretation must be resolved.

The purpose of this letter is to pose those questions for your consideration. It would be very much appreciated if you could arrange to have them reviewed and furnish me with the opinion of the Justice Department on these matters.

The questions posed for your consideration are as follows:

1. Does Section 552 (a) (3) of Title 5 of the United States Code (the Freedom of Information Act) which provides that "Each agency, on request for identifiable records . . . , shall make the records promptly available to any person" apply to (A) records received from a foreign government by the United States Government, or (B) records originated

by the United States Government but containing information derived from a foreign official or foreign document?

Although "records" is not defined in the Freedom of Information Act, we refer to the definition of records in 44 U.S.C., Section 3301.

2. Under Section 552 (b) of Title 5 of the United States Code which sets forth certain exceptions to sub-section (a) (3), does an agency have authority to withhold from public release foreign classified information received by the United States Government? Particular reference is made to the first exemption of the Freedom of Information Act and Section 4 (C) of Executive Order 11652.

3. In the absence of an executive agreement or treaty by the United States with a foreign government, does the head of an agency or department of the United States Government have authority pursuant to Executive Order 11652 to declassify, without the prior consent of the originating foreign government, classified information or records received from that government and in the custody of the United States Government?

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4. Does the head of an agency or department of the United States Government have authority pursuant to Executive Order 11652 to declassify, without the prior consent of the originating foreign government, classified information received from that government by the United States if there is in existence (A) an executive agreement between that government and the United States in the form attached at Tab A; or (B) a treaty between that government or an international organization and the United States in the form attached at Tab B? Further, what is the force and effect of such agreement or treaty if it was adopted prior to the effective date of Executive Order 11652?

Your assistance in preparing the legal opinion of the Justice Department on these matters is greatly appreciated. For further details relating to the background and negotiation of the executive agreement attached, you should contact Mark Spiegel in the Office of the Legal Adviser the Department of State or Frank Bartimo in the Office of the General Counsel of the Department of Defense.

Very truly yours,

James B. Rhoads
Acting Chairman
Interagency Classification
Review Committee

Honorable Robert G. Dixon
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D. C. 20530

cc: Members of the Interagency Classification
Review Committee

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THE WHITE HOUSE

WASHINGTON

June 4, 1973

CLASSIFICATION AND DECLASSIFICATION OF FOREIGN
CLASSIFIED INFORMATION AND MATERIAL UNDER
E. O. 11652

Statement of Problem:

The United States Government receives and retains large volumes of foreign originated classified information and material. Although there are a few bilateral agreements for the protection of foreign classified material, in most cases continued classification and protection is based upon principles of international comity recognized in E.O. 11652. Unless the concept of automatic declassification established by E.O. 11652 is applied to foreign classified information and material, an impossible declassification problem will be created resulting in the indefinite classification of such material.

Objective:

To promote a system for the protection and subsequent automatic and early declassification of foreign classified information and material which will find acceptance in the international community and not damage U. S. foreign relations.

Discussion:

The laws of another country have no validity by themselves within the U. S. Rather legal protection of foreign originated classified documents within the U. S. must be derived from laws, treaties, or executive orders promulgated by the U. S. government.

In the past, a few recognized arrangements with such international organizations such as NATO, CENTO, and SEATO existed to cover security protection of their classified documents. In addition, certain

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reciprocal arrangements exist between the U. S. Joint Chiefs of Staff and the British Chiefs of Staff concerning records of combined interest. For the most part, however, the international principle of comity seems to have been the basis for the various departments policy of protecting such foreign classified material. As Mr. Brower indicated in his presentation to the ICRC, 50 years is generally accepted in the international community as the period for the protection of classified information.

While recognizing the value of this reciprocal protection system in the absence of official U. S. regulations, in most cases the result has been indefinite protection of foreign classified documents regardless of the diminishing need for protection with the passage of time. The procedures and authority for the protection of these foreign documents is now contained in E. O. 11652, which establishes new guidelines for dealing with declassification of U. S. and foreign classified information. It is incumbent upon us to work to apply the progressive standards of E. O. 11652 to the declassification of foreign classified information and to seek acceptance of them in the international community rather than taking a conservative approach which will result in blanket exemption of these materials from declassification.

1. Receipt and protection of foreign classified information.

U. S. departments deal with foreign classified material after it has been created and after the classification level has been established by the originating country. Section 4 (C) of the Executive Order states:

"Classified information or material furnished to the U. S. by a foreign government or international organization shall either retain its original classification or be assigned a U. S. classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government which furnished the information or material."

This section deals only with the problem of the level of classification and the degree of protection to be afforded foreign classified information or material furnished the U. S. government. In practice, a foreign

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classified document is given protection comparable to the equivalently classified document of U.S. origin. Section 4 (C) does not, however, deal with the problem of declassification of foreign classified documents. Guidance on this problem is contained in Section 5 of the Order.

2, Exemptions from the General Declassification Schedule.

Section 5 (B) (1), which is the only other specific reference to foreign classified material in the Executive Order, indicates that foreign classified information may be exempted from the General Declassification Schedule:

"Classified information furnished by foreign governments or international organizations and held by the U.S. on the understanding that it be kept in confidence (may be protected beyond 10 years)."

This section implies that departments receiving foreign and international organization classified information and material after June 1, 1972, will determine whether the material should be marked "exempt" from the General Declassification Schedule by an official authorized to originally classify material as Top Secret. Application of Section 5 (B) to foreign originated material requires the department receiving the information to make a determination based on the following questions:

- (a) Does the information require protection beyond 10 years?
- (b) If the information requires extended protection, at what future date can the information be declassified?

In short, Executive Order 11652 does not authorize departments to apply blanket exemptions to foreign classified material. Individual determinations must be made for foreign classified documents in the same manner as those made for U.S. originated documents. The decision to exempt or not to exempt a foreign classified document from the GDS is based upon guidance from the originating country or on an internal departmental determination. Foreign classified documents which are subject to the GDS will become declassified in six, eight or ten years. Those exempt from the GDS will be protected for the time period indicated, subject to the application of the thirty year rule.

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3. Declassification of foreign classified information or material after thirty years.

While foreign classified material has some unusual characteristics, the approach detailed in the following sections would bring the handling of foreign classified information into line with the provisions of E. O. 11652 and would probably find ready acceptance in the international community.

(a) The same reasoning and categorization already applied to 30-year-old U.S. originated classified information would be applied to 30-year-old foreign classified information. U.S. departments and agencies have issued guidelines to the Archivist for declassification review of 30 year old material to exclude from declassification documents of continuing security sensitivity. It is suggested that these guidelines be consolidated and codified to form the basic guidelines for a review of similar foreign classified information. [For example, foreign intelligence sources and methods and communications intelligence would be types of foreign information that would be subject to protection beyond 30 years] Particular security sensitivities of the countries originating the information could be added to the guidelines to provide the basis for review of thirty year old foreign classified material. In other words, only certain limited categories of foreign classified information would be exempt from automatic declassification after the material becomes 30 years old.

(b) As potentially exempt documents are encountered during review, they would be referred for necessary action to the U.S. department having primary subject matter interest. That department would review the documents referred to it and determine from its expert knowledge and familiarity with current sensitivities whether the information required further protection, and if so, how long this protection should be extended. If the department felt that it could not make a determination in a specific instance, referrals could be made to the country of origin. The State Department and all of the military services have direct channels of communication with most foreign countries and should be able to obtain a response from those governments within a reasonable time, Civil agencies without such contacts abroad have to coordinate such requests through a designated office in the Department of State. The need for referrals to the country of origin would probably be minimal.

(c) Section 5 (E) (2) would continue to apply. The heads of departments having primary subject matter interest would certify to the Archivist of the U.S. itemized lists of 30 year old exempted foreign classified documents requiring continued protection, state the reasons for the decision, and the length of continued protection required. The process would be identical

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to that used for U.S. originated documents which require protection beyond 30 years.

(d) Foreign originated documents which have been certified by the heads of departments having primary subject matter interest as requiring protection beyond 30 years are subject to the mandatory review provisions of the Executive Order.

4. Mandatory Review of Exempted Foreign Originated Material

Foreign classified material which has been exempted from the GDS and which is ten or more years old would be subject to the mandatory review provisions of Sections 5 (C) and (D) of E. O. 11652. U.S. departments having primary subject matter interest must accept and process mandatory review requests for exempted foreign classified documents in essentially the same manner as requests for U.S. originated material. Departments receiving the mandatory review requests can make declassification determination themselves or refer the requests to the countries of origin for determination. There are, of course, certain practical problems involved in making determinations on more current material which do not arise with material over 30 years old. If the departments must refer documents to the country of origin, the requester should be informed of this procedure and advised that it may take some time to receive a response from the country involved. Further a requester would be allowed to appeal a denial of his request unless the document was forwarded to the country of origin for determination.

Conclusion:

Foreign classified documents are subject to E. O. 11652, including mandatory review and automatic declassification after 30 years. The U.S. agency of primary subject matter interest must assume responsibility for acting on mandatory review requests, including denying them and must assume responsibility for certification of documents to be kept classified beyond 30 years.

Richard C. Tufaro



April 26, 1973

MEMORANDUM FOR Mr. Richard Tufaro

SUBJECT: Foreign Classified Information

My attention has been directed to the ICRC Minutes of March 7, 1973, in which State and AEC are reported to have said that "all foreign classified material" is not considered to be exempt from the General Declassification Schedule (GDS). I am informed that this is in violation of the security agreements the United States has signed with various countries. Under these agreements, the United States cannot take unilateral action to downgrade and declassify foreign origin classified information which has been entrusted to the U.S. See attached Change No. 2 to USSAN Instruction 1-69, "Implementation of NATO Security Procedure (U)," December 20, 1969, p. 24. It provides in part, "NATO classified documents may be downgraded or declassified only by or with the consent of the originating office ****."

The U.S. is obligated to respect the security classification that foreign originators have assigned to their information and material for so long as they, not we, say it is classified. They must do the same for our information and material. There is no leeway to "give separate consideration to that sensitive portion of foreign material which warrants classification beyond the 30-year limit," as you suggest. We can request the foreign government to review the continued validity of the classification, but that is as far as we can go.

The following rules have been proposed to me. I believe they deserve consideration.

- a. Whenever the U.S. Government receives documents or other material which have been originated and classified by a foreign government, those documents shall remain classified until downgraded or declassified by the foreign government. Such documents or materials are not subject to the U.S. General Declassification Schedule, and are not

Upon removal of attachment
this document becomes

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to be marked with any U.S. downgrading/declassification marking. Such documents are not subject to the 10-year and 30-year declassification reviews specified in E.O. 11652.

- b. Classified information from a foreign originated document which is incorporated into a U.S. document is not subject to unilateral downgrading or declassification by the U.S. Any U.S. prepared document which contains foreign origin classified information must be marked with the XGDS stamp citing the foreign classifier (or document) and exemption category (1). (Only a U.S. RD or FRD requirement would be preemptive.) The foreign originated classified information should be identified specifically so that it is not inadvertently released to third country nationals. The U.S. prepared document is subject to the 10-year and 30-year declassification review requirements of E.O. 11652, but the foreign origin classified information contained therein can be downgraded or declassified only with the approval of the foreign originator.
- c. Information supplied to the U.S. by a foreign source and identified as classified by a foreign source must be treated in the manner stated in b. above for classified information taken from a foreign classified document.
- d. Information received from a foreign source and not specifically identified as classified by the foreign source would be considered for classification and marked according to U.S. standards. Such information, if classified, would be subject to downgrading and declassification according to U.S. requirements.

There is no need to amend E.O. 11652 to cover the foregoing. Foreign originated classified documents are not under U.S. classification jurisdiction. The President has not made them subject to the GDS of E.O. 11652, nor would it be proper under our foreign security agreements to do so. In turn, we expect reciprocal treatment from governments to which we release U.S. classified information and material. Continued classification of foreign origin information or material beyond 30 years requires no action by any U.S. official. However, when warranted, we should request the foreign originator to downgrade or declassify.

Robert T. Andrews

Robert T. Andrews
Office, Assistant General Counsel
for Foreign Affairs,
Health and Environment)

ATINTL

Approved For Release 2003/09/30 : CIA-RDP75-00793R000200170009-1

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION



DATE: June 12, 1973

National Archives and Records Service

Washington, D.C. 20408

REPLY TO
ATTN OF: Deputy Archivist of the United States

SUBJECT: Guidelines for Declassification of 30 Year Old
Foreign Classified Information and Material

Richard C. Tufaro

Enclosed is a set of suggested guidelines to be used for declassification review of 30 year old foreign originated classified information. The guidelines are based on the guidelines of U.S. agencies and those issued by the British Government for review of British originated documents. Definitions of the terms used in the restriction categories would be the same as those currently used by U.S. departments and agencies in their guidelines.

for Adrienne Thomas
JAMES E. O'NEILL

Enclosure

GUIDELINES FOR THE EXTENDED SECURITY PROTECTION OF
FOREIGN AND INTERNATIONAL ORGANIZATION ORIGINATED
INFORMATION AND MATERIAL

All foreign and international organization security-classified information will be automatically declassified at the end of the 30th full calendar year following the year in which it originated unless it falls within one of the following two general categories:

- (1) Classified information or material affecting the security of the nations concerned.
- (2) Classified information or material the disclosure of which would place a person in immediate danger.

Under the first category, the following types of classified information would be recognized as affecting the national security of the nations concerned:

- ✓ (a) Information originated by the foreign or international organization's intelligence agencies and revealing covert methods, covert organization and special financing.
- ✓ (b) Information concerning communications intelligence or cryptography, or their related activities.
- (c) Information concerning chemical, biological, and radiological warfare.
- (d) Information which specifically shows the precise longitude and latitude coordinates of strategic and/or

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- ✓ (e) Information concerning or revealing escape, evasion, cover, or deception plans, procedures, and techniques; or operations relating thereto.
- (f) Technical information concerning weapon systems and equipment in current use or design which reveals the capabilities, limitations, or vulnerabilities of such systems or equipments and thus could be exploited to counter, render ineffective, neutralize or destroy them.
- (g) Information which if released would adversely affect the conduct of the concerned country's current foreign policy.
- (h) Information concerning plans for an operation of war affecting the territory of another nation.

Under the second category, the following information would be recognized as the type which could place a person in immediate jeopardy:

- ✓ (a) Identifiable individuals and organizations as covert sources of intelligence.
- ✓ (b) Identification of intelligence agents.

Confidentiality
All foreign and international organization originated classified information or material in the above categories may be exempted from automatic declassification after 30 years, but it is automatically downgraded from Top Secret (or equivalent level of protection) to Secret at the end of the thirtieth calendar year following the year in which it was originated.

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All foreign and international organization originated information which is categorized above as being exempted from automatic declassification after 30 years, shall be declassified if, upon review by the U.S. Government Department of primary subject-matter interest, a determination is made that such information no longer requires extended protection. If necessary, the responsible U.S. Department will refer questionable cases to the originating foreign government or international organization for a declassification determination. Foreign and international organization originated information and material which has been exempted from declassification at 30 years will be handled in the same manner as U.S. originated exempted materials (E.O. 11652, Sec. 5(E)).